

Bach (Migration) [2022] AATA 1384 (26 April 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr TUNG LINH BACH
REPRESENTATIVE:	Mr Quang Nhat Nguyen (MARN: 0746874)
CASE NUMBER:	1818511
HOME AFFAIRS REFERENCE(S):	BCC2017/2273978
MEMBER:	Christine Kannis
DATE:	26 April 2022
PLACE OF DECISION:	Perth
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 26 April 2022 at 1:36pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – no appearance at hearing – limited or no evidence provided of current household, financial and social aspects of relationship and nature of commitment – no statutory declaration by sponsor provided – decision under review affirmed

LEGISLATION

*Migration Act 1958 (Cth), ss 5F(2)(a), 65, 362
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221*

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 27 June 2017 on the basis of his relationship with his sponsor, Ms Katie Nguyen. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The visa was refused because the delegate was not satisfied that the applicant's relationship with the sponsor met the definition of spouse under the Act and therefore he did not satisfy cl 820.211(2)(a).
4. A copy of the Decision Record was submitted to the Tribunal by the applicant for the purposes of the review.
5. On 31 March 2022 the applicant was sent an Invitation to attend a videoconference hearing at 11.00 am (NSW time) on 26 April 2022. The applicant was also advised in the hearing invitation that if he did not attend the scheduled hearing, the Tribunal may make a decision on the review without taking any further action to allow him to appear before it. The Invitation included a request that in accordance with the Practice Directions the applicant provide witness statements at least 7 days prior to the hearing.
6. On 7 April 2022 the Tribunal received a response indicating that the applicant, the sponsor and the applicant's representative would be attending the hearing.
7. On 13 April 2022 the Tribunal sent the applicant a reminder that witness statements were to be received by COB 19 April 2022. On 22 April 2022 statutory declarations made by the applicant and two witnesses were provided. No witness statement or statutory declaration made by the sponsor was received.
8. On 14 April 2022 the Tribunal sent the applicant an SMS hearing reminder confirming the time and date of the hearing. The SMS was sent to the mobile telephone number provided by the applicant.
9. On 22 April 2022 the Tribunal sent the applicant an SMS hearing reminder confirming the time and date of the hearing. The SMS was sent to the mobile telephone number provided by the applicant.
10. At the commencement of the hearing the applicant's representative informed the Tribunal that he had been unable to contact the applicant. He advised that the applicant was to be in his office with him to attend the hearing. The representative advised that he had been unable to contact the applicant by telephone.
11. At approximately 11.15 am (NSW time) the Tribunal attempted to contact the applicant on the mobile telephone number he provided. The call went to message bank. The Tribunal made two further attempts at 11.50 am (NSW time) and 12.15 pm (NSW time). The calls went to message bank. The Tribunal also attempted to contact the sponsor at 11.50 am

(NSW time) and 12.15 (NSW time) on the mobile telephone number provided. The calls went to message bank.

12. The Tribunal acknowledges that the ability to proceed to decision is only discretionary and that thought should be given to the use of such discretion fairly. The Tribunal considers, however, that it is not for the Tribunal to make the case for the applicant. That the applicant is represented by a migration agent and was reminded on two occasions recently by SMS about the hearing, strongly persuades the Tribunal that all reasonable steps have been taken to enable the applicant to appear before the Tribunal.
13. In these circumstances and pursuant to s.362 of the Act, the Tribunal has decided to make a decision on the review without taking any further action to enable the applicant to appear before it.
14. The applicant was represented in relation to the review.
15. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s 5F of the Act.
17. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
18. Section 5F provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F (2) (a)–(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship; the nature of the household and the persons' commitment to each other as set out in reg 1.15A (3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
19. The applicant is a 36-year-old Vietnamese national. The sponsor is a 40-year-old Australian citizen. The parties met on 10 January 2015 and were married on 17 February 2017. The sponsor has two children from a previous relationship, a daughter (DOB 21 July 2011 and a son (DOB 15 May 2015).

Whether the parties are in a spouse or de facto relationship

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The evidence provided included a Certificate of Marriage showing the applicant and the sponsor married in Fairfield, New South Wales on 17 February 2017.

21. On the basis of the written evidence before it the Tribunal concludes that the marriage satisfies the requirements for a valid marriage for the purpose of the Act as required by s 5F (2)(a).

Background

22. The applicant arrived in Australia on 1 January 2014 as the holder of a Subclass 573 visa.
23. The delegate noted that in the *Application for migration to Australia by a partner* the applicant indicated that he and the sponsor met at the house of a mutual friend on 10 January 2015 however during an interview with the Department on 22 May 2018, he said they met at a coffee shop. In a statutory declaration dated 19 April 2022 the applicant referred to this inconsistency and said that they met for the first time at a mutual friend's house and exchanged phone numbers. He said their first date was at a coffee shop.
24. The delegate also referred to the applicant at the interview being unable to explain in convincing detail as to the reason he decided to phone and text the sponsor when she was pregnant with her second child and in a relationship with her spouse or why he decided to commit to a marriage with a person who is older than him and has two young children. In his statutory declaration the applicant said he was attracted to the sponsor's pretty face and beautiful smile and said he did not know she was pregnant. He said age gaps and family background do not matter "if love is big enough". The Tribunal notes that in January 2014 the sponsor was five months pregnant and therefore considers it unlikely that the applicant was not aware of her pregnancy. In his statutory declaration he did not explain the reason he phoned and texted the sponsor when she was in a relationship with her spouse.
25. The parties provided a Statement of Current Relationship signed on 25 June 2017 in which they described how they met, the development of their relationship and provided information addressing the reg 1.15A (3) factors.

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship

26. The Tribunal considered the evidence in relation to the financial aspects including joint ownership of assets, joint liabilities, any legal obligations owed to the other party, the extent of pooling of financial resources and any sharing of day-to-day household expenses.
27. In the *Application for migration to Australia by a partner* the applicant said:
Currently, my wife has a stable job at coffee bar while I am studying and doing part-time job. in the near future, I will find another suitable job to contribute to our family's finance. My wife is good at finance so she manages the money.
28. In a Statement of Current Relationship dated 25 June 2017 the parties said:
In term of finance, currently both of us also have jobs. my husband works part time. In the forthcoming time, after completing the study program, my husband will find a full time job hopefully we are financially better supporting our family life
29. Westpac Bank statements dated from 15 February 2017 to 15 June 2017 and from 28 June 2017 to 28 December 2017 for an account in the parties' joint names were provided. The credit transactions include transactions described as wages and deposits from the sponsor's CBA account. The debit transactions include food, telephone and transport costs.

30. Commonwealth Bank statements for an account in the parties' joint names were provided. The statements were for periods from 1 July 2019 to 29 July 2021. The credit transactions consist mainly of transfers from third parties although there were some Centrelink credit transactions in 2021. There is no indication of which account holder was in receipt of a Centrelink payment and the no explanation was provided regarding the transfers from third parties. The debit transactions included payment of day-to-day household expenses such as food, fuel and telephone costs.
31. In a statutory declaration dated 19 April 2022 the applicant said the sponsor has no income and he gives her \$400 per week to buy their food. There is no evidence before the Tribunal to substantiate the applicant's claim that he gives the sponsor \$400 at the time of decision.
32. The sponsor's Club Plus superannuation statement dated 13 June 2017 shows there are three beneficiaries of the policy, one of whom is the applicant. His percentage is indicated to be 20%. The other two beneficiaries are her two children from a previous relationship and they each have a 40% share entitlement. The Tribunal gives this some weight in relation to the time of application criteria.
33. There is no evidence before the Tribunal that, at the time of application or at the time of this decision, the applicant and the sponsor jointly owned any real estate or other major assets or that they have any joint liabilities. There is no evidence that one person in the relationship owes any legal obligation in respect of the other at the time of decision. The Tribunal accepts the parties' evidence in their Statement of Current Relationship dated 25 June 2017 that they pooled their financial resources and shared expenses at the time of application. However, no evidence has been provided to demonstrate a pooling of financial resources or sharing of day-to-day household expenses at the time of decision and the Tribunal so finds.
34. The Tribunal finds that the available evidence in relation to the financial aspects of the parties' relationship does not demonstrate that the parties are in a genuine and continuing spouse relationship at the time of application and at the time of decision.

Nature of the household

35. The Tribunal considered the evidence in relation to the nature of the household including any joint responsibility for care and support of children, the parties' living arrangements and any sharing of housework.
36. In the *Application for migration to Australia by a partner* the applicant stated:
Every day, after work, we have dinner together as family with our children and I help the kids with homework, my wife washes the dishes. on the weekends, our usual routine is to do laundry, clean around the house, then go shopping, sometime go to city.
37. In a Statement of Current Relationship dated 25 June 2017 the parties said:
Currently, we live together with my children at 7 Yarra Place, Si Johns Park. NSW 2176. My husband is quite busy as lie is now studying and working. I also have a stable job at the coffee bar. In the evening, we have dinners together and share the activities in a single day and share the household chores, care for our children together. At weekends, we usually go out in the city, buy food and household necessary items.
38. Correspondence dated from December 2016 to March 2018 addressed to the applicant or to the parties jointly at Yarra Place, St Johns Park, NSW 2176 (Yarra Place) was provided. The parties' respective driver's licences show they are both registered as residing at this address. Correspondence dated in 2019, 2021 and 2022 addressed to the applicant only at Yarra Place was provided. Evidence of correspondence and packages dated in 2021

addressed to the sponsor only at Yarra Place was provided. The Tribunal gives this some weight. The Tribunal accepts that the parties resided together at the time of application.

39. In a statutory declaration dated 19 April 2022 the applicant said he and the sponsor share household duties. There is no evidence before the Tribunal to substantiate the applicant's claim that he and the sponsor share household duties.
40. Based on the documentary evidence, the Tribunal accepts that the parties resided together and shared housework at the time of application. However, there is no evidence from the sponsor regarding their current living arrangements.
41. The Tribunal decided the evidence of the nature of the household at the time of application indicates that the parties were in a spouse relationship however at the time of decision there is insufficient evidence to find that they are currently in a genuine and continuing spouse relationship.

Social aspects of the relationship

42. The Tribunal considered the evidence in relation to the social aspects of the relationship including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.

43. In the *Application for migration to Australia by a partner* the applicant said:

44. *Our relationship is shared openly with friends and family. my wife and I attend all our friends parties together. In our spare time, we often gather with some of our friends such as thanh, thuan, huy, hanh, toan, cong, cuong, etc. at weekend, we took my wife's two little children go around the city.*

45. In the Statement of Current Relationship, the parties said:

In our spare times, we would like to relax meeting our friends such as Thanh, Thuan, Huy, Hanh. Toan, Cong and Cuong, etc. On the weekends, we sometimes take our children to amusement place such as park, shopping mall, leisure center, etc..

46. A statutory declaration dated 23 June 2017 made by Ms Trong Luong Nguyen was provided. Ms Nguyen said she spends time with the parties at dinners and for coffee. Her reasons for her belief that the parties' relationship is genuine and continuing included that the sponsor is happier than she has appeared before and that the parties take care of each other. The Tribunal gives this some weight in relation to the time of application criteria.
47. A statutory declaration dated 23 June 2017 made by a friend of the applicant, Mr Van Binh Hoang, was provided. Mr Hoang's reasons for his belief that the parties' relationship is genuine and continuing included that the applicant has been very happy in his relationship with the sponsor. He made a later statutory declaration dated 19 April 2022 in which he said he meets up with the parties on weekends. He said he has a strong belief in the applicant's marriage as he sees he currently has a happy family with a caring wife and many future plans to carry out with her. Given the general nature of the statements made about the parties' relationship, the Tribunal gives this evidence minimal weight.
48. A statutory declaration dated 19 April 2022 made by Mr Truong Linh Nguyen was provided. Mr Nguyen said he attended the parties' wedding in 2017 and catches up with them now and then for coffee or dinner. He said from his own observation he believes the parties truly love each other and have made a strong commitment to their relationship. He said they enjoy each other's company and are currently living together happily at Yarra Street. Given the

general nature of the statements made about the parties' relationship, the Tribunal gives this evidence minimal weight.

49. Photographs of the parties' wedding in 2017 were provided. Photographs indicated to have been taken in 2017 and 2018 were provided however they were primarily of the parties or of the parties with the sponsor's two children and do not demonstrate that the parties undertake joint social activities with other people as a married couple. Prior to the hearing 10 photographs described as *Daily Photos of Tung Linh Bach and Katie Nguyen* were provided. Only two of the photographs were dated, one in 2019 and the other in 2022. The photographs showed the parties together or the parties with the sponsor's two children and do not show them socialising with other people. Accordingly, the Tribunal gives this evidence minimal weight.
50. The sponsor's Club Plus superannuation statement dated 27 February 2017 shows there are three beneficiaries of the policy and describes her relationship with the applicant as "Husband". The Tribunal gives this some weight in relation to the time of application criteria.
51. The evidence before the Tribunal in relation to the social aspects of the relationship was limited. The Tribunal accepts that two friends provided statutory declarations attesting to the genuineness of the parties' relationship at the time of application. The evidence provided by one of the declarants did not provide persuasive reasons for his belief about the nature of the relationship and both declarants had known the applicant for just over two years at the time of declaration. Despite the limited evidence, the Tribunal is satisfied that at the time of application the parties represented themselves to other people as being in a spouse relationship with each other. The statutory declarations provided at the time of decision do not provide persuasive reasons for the declarants' beliefs about the nature of the relationship. There is no evidence before the Tribunal that the parties plan and undertake joint social activities at the time of decision and the Tribunal so finds.
52. Given the minimal evidence about the social aspects of the parties' relationship at the time of decision, the Tribunal finds there is insufficient evidence to find that they are in a genuine and continuing spouse relationship at the time of decision.

The nature of the persons' commitment to each other

53. The Tribunal considered the evidence in relation to the nature of persons' commitment to each other including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term.
54. In the *Application for migration to Australia by a partner* the applicant said:

My wife always gives me emotional support. she cares for me every little things. I understand her well her feelings and try to support her as much as i can. rarely we disagree but mostly we are happy being with each other, sharing our stories of the day after work, we enjoy good quality family time, playing and joking for a laugh after a tired day from work etc

Our relationship develops over time, my wife is gentle and caring. our future plan is that I shall find a stable job after my graduation. then, we shall have two children as we are young. We shall build a happy family and nurture our children together in good environment.

55. In the Statement of Current Relationship dated 25 June 2017 the parties said:

*We intend to have two more children as we are still young. We love to build our happy family and nurture our children until they mature and independent together.
My husband is a solid emotional support for me. We share all happiness and hardships in life.
I am very pleased and satisfied with our marriage with my dear husband. We shall treasure our love, grow old together and overcome all difficulties may come our way.*

56. In a statutory declaration dated 19 April 2022 the applicant said his relationship with the sponsor is purely for love and for no other reason. He said it is their desire to quickly have a stable life and a new chapter together. As noted, no witness statement or statutory declaration made by the sponsor at the time of decision was provided. The most recent evidence of the nature of the sponsor's commitment was in the Statement of Current Relationship dated 25 June 2017.
57. The applicant's and the sponsor's Individual Tax Returns for 2019, 2020 and 2021 were provided. The documents show that they each indicated the other as their spouse during the relevant financial year. The Tribunal gives this evidence some weight but notes that the most recent Individual Tax Returns were prepared 10 months ago.
58. The Tribunal decided there is insufficient evidence in relation to the nature of the persons' commitment to each other and finds that the available evidence does not demonstrate that the parties are in a genuine and continuing spouse relationship at the time of decision. The Tribunal accepts that the parties each expressed an intention to grow old together at the time of application however there is no evidence to support whether they currently have a mutual commitment to a shared life together to the exclusion of others or whether they provide emotional support to each other at the time of decision.
59. The Tribunal gives little weight to the evidence of the nature of the persons' commitment to each other.

Conclusion

60. The Tribunal acknowledges that some elements of the evidence support the parties' claims about the genuineness of their relationship. The Tribunal finds at the time of application the financial aspects of their relationship was limited to some pooling of resources and sharing of expenses. The Tribunal finds that the parties were living together at the time of application. The Tribunal finds at the time of application the parties represented themselves to other people as being in a spouse relationship. However, having considered carefully all the evidence cumulatively and collectively, including the reg 1.15A(3) matters to which it is required to have regard, the Tribunal is not satisfied that the weight of evidence supports a finding that the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life together to the exclusion of all others at the time of decision. In making this determination the Tribunal takes into account the written evidence and documents provided, the absence of a witness statement or statutory declaration made by the sponsor despite the Tribunal's two requests and the applicant's failure to appear at the hearing. As noted, the Tribunal attempted to contact the applicant and the sponsor a number of times on the day of the hearing.
61. Regarding whether the requirements of s 5F(2) were met at the time of decision, the Tribunal decided:
 - the parties were married to each other under a marriage that is valid for the purposes of the Act;
 - there is insufficient evidence to demonstrate that the parties live together or do not live apart on a permanent basis;

- there is insufficient evidence to demonstrate that the parties have a mutual commitment to a shared life together to the exclusion of others; and
- there is insufficient evidence to demonstrate that the parties' relationship is genuine and continuing.

62. On the basis of the above, the Tribunal is not satisfied that the requirements of s 5F(2) are met at the time of this decision.

63. Therefore, the applicant does not meet cl 820.221.

64. No claims have been made in relation to the alternative criteria in cl 820.211(7), 820.211(8), 820.211(9), 820.221(2) and 820.221(3).

65. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

66. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Christine Kannis
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).